No. 88-33

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

KIRBY D. BLEDSOE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the prosecutor's use during cross-examination of a defense psychiatrist of two statements petitioner made during a pretrial sanity evaluation was plain error, in violation of Mil. R. Evid. 302.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-14a) is reported at 26 M.J. 97. The initial opinion of the Air Force Court of Military Review (Pet. App. 15a-22a) is reported at 16 M.J. 977. The opinion of the Air Force Court of Military Review on further review (Pet. App. 25a-35a) is reported at 19 M.J. 641. The order of the Air Force Court of Military Review denying a petition for a new trial (Pet. App. 23a-24a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 9, 1988. The petition for a writ of certiorari was filed on July 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Following a general court-martial at Lackland Air Force Base in Texas, petitioner, a member of the United States Air Force, was convicted of willful damage to military property and larceny, in violation of Articles 108 and 121 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 908 and 921. He was sentenced to confinement for 30 months, a dishonorable discharge, and ancillary punishments. The convening authority approved the findings and sentence. The Air Force Court of Military Review initially remanded the case for an additional inquiry into petitioner's competence and mental responsibility (Pet. App. 15a-22a). Following that inquiry, the Air Force Court of Military Review denied petitioner's request for a new trial (*id.* at 23a-24a) and subsequently affirmed the findings and sentence (*id.* at 25a-35a). The Court of Military Appeals affirmed (*id.* at 1a-14a).

1. Petitioner was charged with stealing various items from two fellow airmen at Kelly Air Force Base in Texas on July 14, 1982. Pet. App. 3a, 26a. After being charged with larceny, petitioner went to Houston, Texas, to visit with his defense counsel (Tr. 159). While in Houston, petitioner committed himself to a civilian hospital for a psychiatric examination and treatment (*ibid.*). He was subsequently transferred to Wilford Hall Air Force Medical Center at Lackland Air Force Base in Texas (Tr. 159, 162). A sanity board[1] was convened pursuant to a

[1] A "sanity board" conducts a psychiatric examination of the accused to determine his competency to stand trial and his mental responsibility at the time of the offense. Examination by a sanity board may be ordered by the convening authority or trial judge sua sponte, or on the request of the prosecutor, defense counsel, or investigating officer, whenever there is reason to believe that the accused is incompetent to stand trial or was insane at the time of the alleged offense.

request by petitioner's counsel. On December 22, 1982, the board reported that petitioner had a neurosis known as a "conversion disorder" and that he was malingering (PX 1; see Tr. 7-10, 23-26, 163-165).[2] The board found that petitioner was competent to stand trial and concluded that at the time of the charged offense petitioner did not lack substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law (PX 1; Tr. 12, 23-26, 163, 165-166).[3] On December 29, petitioner was informed about the sanity board's report (Tr. 213), and the next day he damaged his hospital room (Tr. 174-177, 179, 181, 184-187, 213; PXs 5-10). Later that day, when he was returned to Kelly Air Force Base, petitioner also damaged his dormitory room at the

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[2] A "conversion disorder" is a neurotic condition characterized by the involuntary production of physical symptoms that suggest a loss of or alteration in physical functioning (such as paralysis, blindness, seizures, stuttering, etc.), but is actually an expression of psychological conflict or need. APA, *Diagnostic and Statistical Manual of Mental Disorders* 244 (3d ed. 1980). "Malingering" is not considered a mental disorder. It is characterized by the voluntary production and presentation of false or grossly exaggerated physical or psychological symptoms in pursuit of obviously recognizable and understandable goals (such as avoidance of military duty or prosecution for a crime). *Id.* at 331. Malingering presents features that are similar to a conversion disorder, but malingering differs in that the production of symptoms is voluntary and the reasons for producing them is obvious and recognizable. *Id.* at 332. See Tr. 8, 163-164, 211-212.

[3] The test for insanity that was in effect at the time of petitioner's trial was the one proposed by the American Law Institute's Model Penal Code § 4.01 (1974), which provided that an accused is not mentally responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, the accused lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. See *United States* v. *Frederick*, 3 M.J. 230 (C.M.A. 1977); *Manual for Courts-Martial, United States – 1969* para. 120*b* (rev. ed.) (*Manual*).

base (Tr. 182-184; Pet. App. 4a). Those actions led to petitioner's being charged with willfully damaging government property.

2. At trial, petitioner defended against the larceny charge on the grounds that he did not take the property and that, even if he did, he was unable to form the requisite intent for larceny due to voluntary intoxication. Pet. App. 5a n.4, 33a. Petitioner's defense to the willful damage charge was insanity. To support his insanity defense, petitioner called Dr. Thomas Martin, a psychiatrist who served on the sanity board (Tr. 63, 89-90, 207-217). Dr. Martin testified that in his opinion petitioner was suffering from a conversion disorder, that he was suffering from that disorder when he damaged the rooms, and that the disorder might have adversely affected petitioner's ability to control his actions. Dr. Martin, however, could not offer "a good answer" as to whether, in light of the conversion disorder, petitioner's damage to the rooms on December 30 was "willful" (Tr. 214-215; Pet. App. 6a). He did testify, however, that petitioner had the capacity to know right from wrong and to control his behavior (Tr. 214).

Following Dr. Martin's testimony, the prosecutor asked the trial judge to release the full sanity board report to the prosecution pursuant to Mil. R. Evid. 302 (Tr. 218).[4] The defense objected on the ground that Dr. Martin's testimony had not "opened the door" to release of the entire

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[4] At the time of petitioner's trial, the prosecution was entitled to receive only the sanity board's ultimate conclusions, not its full report. *Manual* para. 121. The prosecutor was entitled to receive the full report, except for the defendant's statements, if the defense offered expert testimony on the defendant's mental condition. Mil. R. Evid. 302(c). If the defendant introduced his statements or "derivative evidence," the defendant was not entitled to claim a privilege under the rule. Mil. R. Evid. 302(b)(1).

report (Tr. 218-219), but the trial judge overruled the objection and permitted the prosecution to see the entire report (Tr. 222).[5] At that point, the prosecutor advised the court and defense counsel that he had become aware of two statements petitioner had made during his hospitalization at Wilford Hall. One was a statement petitioner made to Dr. Martin that petitioner and his wife were experiencing "financial problems." The other statement was a remark petitioner made in the hallway to his attending psychiatrist, Dr. Wallace Townsend-Parchman, which was overheard by Dr. Martin. In that statement, petitioner told Dr. Townsend-Parchman, " 'You are not going to get me on this offense. I'm going to beat this rap' " (Tr. 222; Pet. App. 7a, 8a). The defense objected on the ground that the statements lacked probative value and were prejudicial (Tr. 222-223).[6] The trial judge overruled the objection (Tr. 223), and Dr. Martin testified about the statements during his cross-examination (Tr. 224-225). Dr.

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[5] Petitioner does not challenge the trial judge's decision to release the full sanity board report to the prosecutor.

[6] Petitioner's entire objection to the statements was as follows (Tr. 222-223):

> The financial statements, of course, were with the belief that he is innocent of the offense. Rather than impugning any sinister motives, beating the system or indicating illnesses, these are consistent with the actions that Airman Bledsoe has taken in electing to plead not guilty to the offense. Secondly, as to the first statement, we would object to it on its probative value; that any probative value that statement has is so slight that it is embarrassing and to the prejudicial effect it will have that it should not be admitted. Again, we see the connection between those two events to be very tenuous at best. Of course, what we have is a young airman with a new family and any airman in that position is presumably going to have financial problems. I think the Air Force has consistently recognized that and we respectfully ask the court not to admit either of those statements.

Martin testified that he learned that "[petitioner] was having considerable financial difficulties and as he put it, he was receiving a lot of pressure from his wife to obtain funds" (Tr. 224). Dr. Martin also said that he overheard petitioner tell Dr. Townsend-Parchman that, " 'I am going to show you guys. I am going to beat this rap' " (Tr. 225).

3. The Court of Military Appeals affirmed. Pet. App. 1a-14a. It suggested (*id.* at 11a-14a) that the prosecutor's use of petitioner's statements to Drs. Martin and Townsend-Parchman may have violated the privilege granted by Mil. R. Evid. 302(a), but the court ruled (Pet. App. 14a) that petitioner had waived his claim of privilege by failing to assert it at trial as a basis for excluding his statements, as required by Mil. R. Evid. 103(a)(1).[7]

ARGUMENT

Petitioner contends that the prosecutor's cross-examination of Dr. Martin, the defense psychiatrist, about certain statements petitioner made in the doctor's presence during the sanity board evaluation violated the Fifth Amendment and Mil. R. Evid. 302(a). Petitioner also argues that the Court of Military Appeals erred in concluding that he waived his claim by not raising it at trial.

1. The admission of petitioner's statements to Dr. Martin did not violate the Fifth Amendment. By the time

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[7] Mil. R. Evid. 103(a)(1), which was taken from Fed. R. Evid. 103(a)(1), provides as follows:

> (a) Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and
>
> > (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

the prosecutor introduced petitioner's statements, petitioner had requested and received a sanity board examination, and he had introduced psychiatric testimony to support his insanity defense. Under these circumstances, petitioner could not invoke the Fifth Amendment against the prosecutor's use of his statements. *Buchanan* v. *Kentucky,* No. 85-5348 (June 24, 1987), slip op. 20-21. Like the defendant in *Buchanan*, petitioner sought a psychiatric evaluation before trial and introduced evidence resulting from that examination in support of a defense of insanity. In that setting, this Court held that the Fifth Amendment is no bar to the prosecution's use of other evidence from the reports of the examination that the defendant requested. See also *Estelle* v. *Smith,* 451 U.S. 454, 465 (1981). The Fifth Amendment analysis should be no different simply because the statements being offered were statements made by the defendant during the period he was undergoing the psychiatric evaluation, rather than excerpts from the examiners' reports—the evidence that was at issue in *Buchanan.*[8]

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[8] The decision below does not conflict with the Third Circuit's decision in *United States* v. *Alvarez,* 519 F.2d 1036 (1975). That case involved 18 U.S.C. 4244, which authorizes a district court to order a psychiatric examination of the defendant to determine his competency to stand trial. In *Alvarez,* the court held that Section 4244 does not permit the government to introduce the testimony of a psychiatrist who examined a defendant for competency under the authority of that statute, when the testimony is used to rebut an insanity defense. 519 F.2d at 1044. The court read the statute in that manner because of its concern that allowing the government to introduce a psychiatrist's testimony would violate the defendant's Fifth Amendment rights. *Ibid.* In light of this Court's subsequent decision in *Buchanan* v. *Kentucky, supra,* the Third Circuit's concern is now unfounded. In any event, the *Alvarez* case was not a direct application of the Fifth Amendment. Rather, the court construed 18 U.S.C. 4244, a statute not at issue in this case.

2. With respect to the claim that the introduction of petitioner's statements violated Mil. R. Evid. 302, the Court of Military Appeals correctly ruled that petitioner waived that objection at trial. Rule 103(a)(1), Mil. R. Evid., requires the defendant to specify the particular ground on which evidence should be excluded and provides that the failure to do so constitutes a waiver of that claim. Because petitioner objected only to the relevance and prejudicial effect of the statements, and not on the ground that the statements were privileged under Rule 302, the Court of Military Appeals properly held that petitioner could not assert his claim of privilege for the first time on appeal.

Petitioner does not deny that he failed expressly to invoke Mil. R. Evid. 302(a) at trial. Rather, he argues (Pet. 10) that his claim was apparent when considered in context and that it was unnecessary for him to cite that particular rule. That argument is unpersuasive. Despite being advised that the prosecutor was aware of petitioner's statements and sought to use them on cross-examination of Dr. Martin, petitioner objected solely on the grounds of the relevancy and prejudicial effect of his statements (Tr. 222-223). Petitioner did not refer to any claim of privilege or confidentiality, nor did he say anything from which such a claim could fairly be inferred. In these circumstances, petitioner has waived his Rule 302(a) claim.[9]

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[9] Petitioner's argument (Pet. 10) that his claim of privilege was properly invoked when considered in context does not fairly characterize the record. Immediately after defense counsel said "I object" to the prosecutor's request for disclosure of the sanity board report, the trial judge asked defense counsel for "the basis for your objection" (Tr. 219). Defense counsel replied, "The witness has not testified to open up any door for the Government to go behind and see what the sanity board had to say whatsoever" (*ibid.*). That response deals with the issue of disclosure of the sanity board report, not the issue of the

Petitioner also contends (Pet. 9-10) that under the circumstances of this case his failure to object to the admission of his statements under Rule 302 should be excused. As support for his argument, petitioner relies on a footnote in *Estelle* v. *Smith,* 451 U.S. at 468 n.12. Petitioner's reliance on *Smith* is misplaced, however. In *Smith,* the State asserted that the failure to object resulted in the waiver of the defendant's Fifth and Sixth Amendment rights. In this case, as we have noted, petitioner waived any constitutional objection to the introduction of his statements by raising an insanity defense and introducing psychiatric testimony to support that defense. The failure to object therefore resulted in a waiver only of petitioner's claims under Rule 302, not his constitutional claim. The court of appeals in *Smith,* in a ruling adopted by this Court (see 451 U.S. at 468 n.12), held that the failure to object in that case did not constitute a waiver of "all of the many constitutional rights that the state violated," in part because the State did not only rely on the failure to object in the course of habeas corpus proceedings in the federal district court, and in part because the Texas courts had made it clear that they did not regard the constitutional claims as valid. *Smith* v. *Estelle,* 602 F.2d 694, 708 n.19 (5th Cir. 1979). In this case, the government relied below on petitioner's failure to object to the challenged evidence on Rule 302 grounds, and there is no suggestion, on petitioner's part or otherwise, that the invocation of Rule 302 at trial would have been a futile act.

Finally, the Court of Military Appeals found (Pet. App. 14a) that the two statements that were admitted at trial "would have had minimal impact on the factfinder's de-

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use of petitioner's statements at trial. The objection therefore did not amount to a claim of privilege under Rule 302 for petitioner's statements.

termination of guilt or innocence, including mental responsibility." In light of the overwhelming evidence against petitioner (see *id.* at 33a), the court was correct in finding that any error in the admission of the two statements was harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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